



RECLAMATION  
*Managing Water in the West*

# Improving the Environmental Review Process

Stakeholder Workshop 2019  
Denver, Colorado



# Major Environmental Laws

- **National Environmental Policy Act (NEPA)**
- **Endangered Species Act (ESA)**
- **National Historic Preservation Act (NHPA)**
- **Clean Water Act (CWA)**
- **Fish and Wildlife Coordination Act (FWCA)**

# **Other Relevant Laws, Regulations, Policies and Guidance**

- **Council on Environmental Quality (CEQ)**
- **Implementation Regulations (40 CFR 1500)**
- **Interior Implementation Regulations (43 CFR 46)**
- **Departmental Manual (DM 516)**
- **Reclamation's NEPA Handbook ([www.usbr.gov/nepa](http://www.usbr.gov/nepa))**

# **National Environmental Policy Act**

## **Establishes National Policy to:**

- **Create and maintain conditions under which man and nature can exist in productive harmony.**
- **Fulfill the social, economic and other requirements of present and future generations.**

**Directs Federal agencies to prepare EISs for major Federal actions significantly affecting the quality of the human environment.**



# The Federal Action

**Actions include, “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.”** (40 CFR 1508.18(a))



# **NEPA does:**

- **Inform the decision maker before the decision is made.**
- **Require agencies to take a hard look at the action alternatives, environmental effects, and mitigation.**
- **Require agencies to disclose information.**
- **Serve as “umbrella” to coordinate other laws and regulations.**



# **NEPA does not:**

- **Decide which alternative to choose.**
- **Guarantee “perfect” decisions (decision makers base decisions on best available technical and policy information).**
- **Prohibit any actions (may consider actions outside current authority but may not implement without additional authority).**
- **Justify a predetermined action.**
- **Require mitigation for all environmental impacts (Reclamation practice is to mitigate if possible).**

# NEPA Documentation

**There are three levels of NEPA documentation**

- **Categorical Exclusion (CE)**
- **Environmental Assessment (EA)**
- **Environmental Impact Statement (EIS)**





# Departmental Categorical Exclusions

- 12 categories, routine business activities, plus hazardous fuels reduction (prescribed fire of  $\leq 4500$  acres; mechanical methods of  $\leq 1000$  acres)
- Departmental categorical exclusions account for most NEPA actions
- Require no documentation

(43 CFR 46.210)

# Reclamation Categorical Exclusions

## Examples (of 30 categories)

- a. Minor construction activities
- b. Transfer of operation and maintenance of facilities
- c. Administration of project repayment and water service contracts
- d. Minor safety of dams construction activities



# Reclamation Categorical Exclusion List

- See Handout

# Can a Categorical Exclusion be used?

**Is there an existing CE that fits?**

**Are there extraordinary circumstances?**

(43 CFR 46.215)

- Significant impact – public health and safety
- Significant impacts – natural resources and unique characteristics (Migratory Bird Treaty Act, Wild and Scenic Rivers, etc.)
- Highly controversial
- Highly uncertain
- Establish precedent for future action
- Cumulative significance
- Significant impact on eligible properties under NHPA
- Significant impact on species under ESA
- Violate Law
- Disproportionately high and adverse effect on low income or minority populations
- Effects on Indian sacred sites
- Contribute to noxious weed problems



# The Environmental Assessment

**Prepare an Environmental Assessment for actions:**

- **Not on CE or EIS list in Departmental Manual (Reclamation Chapter)**
- **Not expected to result in significant impacts**



# The Environmental Assessment

**Environmental Assessment includes public involvement:**

- **Scoping recommended in some cases**
- **Consider comments**
- **Notification – must be made to announce availability of the Environmental Assessment and Finding of No Significant Impact (FONSI)**

# **The Environmental Assessment**

**The Environmental Assessment contents include:**

- **Need for the proposed action**
- **The proposed action**
- **Environmental impacts of the proposed action**
- **Environmental impacts of alternatives**
- **List of agencies and persons consulted**



# The Environmental Assessment

**An Environmental Assessment results in one of the following:**

- **A finding of No Significant Impact (FONSI), OR**
- **A determination to prepare an Environmental Impact Statement**



# **The Environmental Impact Statement**

**Prepare an Environmental Impact Statement for actions:**

- **Where an Environmental Assessment found need for EIS**
- **Where effects are known, at the outset, to be potentially significant**
- **Normally requiring an EIS (516 DM 14.4)**

**If an action alternative is selected then we would issue a “Record of Decision” (ROD)**

# The Environmental Impact Statement

1. Statement of purpose and need
2. Description of the proposed action
3. Environmental impact of the proposed action
4. Description of the affected environment
5. Any unavoidable adverse effects
6. Description of alternatives
7. Relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity
8. Any irreversible or irretrievable commitments of resources
9. Process used for coordination with other agencies and tribes
10. Agency's preferred alternative (if known in the Draft EIS, must be in Final EIS)

# The Environmental Impact Statement

## Timing of the EIS Process:

- **Scoping – typically 30-day comment period, beginning with Notice of Intent**
- **Public review of Draft EIS – At least 45 days beginning with Notice of Availability of draft**
- **Waiting period for Record of Decision (ROD) – at least 30-days from Notice of Availability (FRN) of Final EIS**
- **However, there is a minimum 90-day period must occur between a Draft and ROD**



# NEPA Process Flowchart

- See Handout

# Endangered Species Act of 1973

## Purposes:

- Protect threatened and endangered species
- Provide a program for conservation of these species
- Uphold treaties and conventions



# Endangered Species Act of 1973

- **Section 7(a)(1): Use of Federal authorities to “do good things for listed species”**
- **Section 7(a)(2): Agencies must assure actions are not likely to jeopardize listed species or adversely affect designated critical habitat**

**Question: Is there a Federal action?**

**Answer: Anything funded, authorized, or carried out in whole or in part by a Federal agency “Federal nexus”**

# Endangered Species Act

- **Biological Assessment:** The action agency's analysis of the effects of a proposed action on listed species and designated critical habitat.
- **Biological Opinion:** The opinion of Service(s) (Fish and Wildlife Service and/or NOAA-Fisheries) on whether the proposed action will jeopardize the continued existence of listed species or adversely modify designated critical habitat.



# ESA Process Flowchart

- See Handout

# National Historic Preservation Act

**Federal agencies inventory and develop programs to protect historic properties and cultural resources.**





# What are cultural resources

- Historical properties, heritage assets, historic buildings and structures, traditional cultural properties, archaeology sites, antiquities





# Section 106 of the NHPA 36 CFR Part 800

- Federal agencies must take into account the effects of undertakings on properties that are included in or eligible for inclusion in the National Register of Historic Places
- Afford the Advisory Council on Historic Preservation a reasonable opportunity to comment prior to the undertaking





# Clean Water Act

**Purpose: “...to restore the chemical, physical, and biological integrity of the Nation’s water.”**



# Clean Water Act

- **Section 401: Certification by state water quality management agency that activity will not violate state water quality standards.**
- **Section 402: National Pollution Discharge Elimination System (NPDES) permits required for point source discharges that could affect the water quality of water of the United States.**
- **Section 404: Requires permit for discharge of dredge or fill material into a “Water of the United States.”**

# Status of “Waters of the United States”

- On February 28, 2017, an Executive Order was signed directing the EPA and Corps of Engineers to review the 2015 Rule defining “waters of the United States” and to consider interpreting the term “navigable waters” as defined by Supreme Court Justice Scalia’s opinion in *Rapanos v. United States* (2006).
- Several states filed lawsuits both for and against repealing the 2015 Rule.
- EPA and the Corps published a proposed rule to revise the definition of the “waters of the U.S. on February 14, 2019. The comment period closed on April 15.



# Fish and Wildlife Coordination Act

- **Consult with Federal and state wildlife management agencies on the effects of "water projects"**
- **Results in recommendations on ways to minimize effects on fish and wildlife resources, mitigation, and enhancement.**





# Break Time

**15 minutes please**

# **Infrastructure/Environmental Initiatives**

**Executive Order (EO) 13766 (January 2017) on *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects***

**EO 13807 (August 2017) on *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects***

**Secretarial Order (SO) 3355 (August 2017) on *Streamlining NEPA Reviews and Implementation of EO 13807 on Environmental Permitting***

# Purpose of the Orders

- Streamline and expedite the environmental reviews and permitting for infrastructure projects
- Process major infrastructure projects under “One Federal Decision” and track on permitting timetable
- Streamline NEPA compliance for Departmental projects
  - Deputy Secretary Memoranda

# Streamlining NEPA Reviews

## Time and Page Limits:

- **Environmental Assessments (EAs)**
  - Limits number of pages to 75
  - Limits time to prepare to 180 days
- **Environmental Impact Statements (EISs)**
  - Limits number of pages to 150
  - Limits time to prepare to 365 days
- **Upload data for all EISs and relevant EAs into Interior's NEPA and Permit Tracking Database**



# Key Points

- **EISs that exceed time and/or page limits must have a waiver approved by the Deputy Secretary**
- **The first line SES member (Regional Director) and Departmental Solicitor assigned to an EIS must read and review the full document**
- **Contractor Guidance – page and time limits must be set in each solicitation and contract for environmental documents**
- **The cost of preparing the EIS must be placed on the cover page.**
- **Bureau NEPA Handbooks are currently being updated.**

# NEPA Document Clearance Process

- **First line SES/Regional Director is directly responsible for the EA or EIS process**
- **EIS Project Team: Regional Director, Solicitor, Project Manager, Document Preparers**
- **Review Team: Commissioner, Assistant Secretary, Director OEPC, Deputy Solicitor, Office of the Deputy Secretary**
- **Briefings held for approvals instead of routing hard copy documents**

# EIS Clearance Process

**EIS Project Team briefs the Review Team to proceed through the EIS process**

- Initial Action Notice (notice)
- Notice of Intent (notice)
- Draft EIS development (verbal briefing)
- Draft EIS and NOA (verbal briefing)
- Final EIS and NOA (verbal briefing)
- Record of Decision (notice)

# Practical Implications of EISs Page Length

- Set a “page budget” for the EIS prior to drafting and ensure all team members/contractors understand the page goals
- Ensure the Purpose and Need is appropriately focused to Bureau authorities
- Focus on a substantive, issue-driven document by only analyzing issues and impacts relative to making an informed decision
- Incorporate by reference, rather than repeating the information
- Organize EIS structure to eliminate and reduce redundancy
- Present supporting details elsewhere such as online or other easily accessible place.



# Practical Implications for EISs

## Time Considerations

- Consider whether an existing NEPA document can be used for tiering or incorporation by reference
- Use pre-NOI time effectively:
  - Gather comprehensive data
  - Informally engage stakeholders to discuss scope and content of EIS
  - Set expectations and gather support from Cooperating Agencies for schedule and page expectations
- Use Scoping effectively
  - Internal and external scoping can begin prior to formal public scoping
  - Scoping can be used to help determine significance of issues and limit their discussion in the EIS

# Categorical Exclusions for Title Transfers

- Title transfer is a voluntary conveyance of ownership (title) for water projects, portions of projects, or project facilities such as dams, canals, laterals, and other water-related infrastructure and facilities to beneficiaries of those facilities.
- Title transfer divests Reclamation of responsibility for the operation, maintenance, management, regulation of, and liability for the project, lands, and facilities to be transferred.
- March 12, 2019, the Natural Resources Management Act was signed into law. Title VIII, Subtitle A, *Reclamation Title Transfer*, authorizes title transfer of projects that meet eligibility criteria under procedures to be established by Reclamation.

# **Categorical Exclusions for Title Transfers**

**Text of Federal Register Notice (83 FR 52503) on Proposed Addition to 516 DM 14, Section 14.5 Categorical Exclusion**

## **F. Title Transfer Activities**

- 1) “Transfer from Federal ownership of facilities and/or interest in lands to a qualifying entity where there are no competing demands for use of the facilities, where the facilities are not hydrologically integrated, where, at the time of transfer, there would be no planned change in land or water use, or in operation, or maintenance of the facilities and where the transfer would be consistent with the Secretary's responsibilities, including but not limited to the protection of land and water resources held in trust for federally recognized Indian tribes and ensuring compliance with international treaties and interstate compacts.”**

# **Temporary Directives and Standards (TRMR) on NEPA Streamlining**

- **To establish a Reclamation-wide policy for streamlining NEPA reviews in compliance with S.O. 3355 and associated Deputy Secretary Memos (DSMs), E.O. 13807 and related requirements.**
- **The benefit of this TRMR is establishment of uniform requirements and standardized processes in compliance with requirements of the SO and DSMs.**
- **Expected to be finalized by June 2019.**



# Question/Discussion

- Any questions?
- Any further discussion on anything we have covered?
- We want your input...





**Art Coykendall**  
**Policy and Administration**  
**acoykendall@usbr.gov**  
**303-445-2915**

**Anastasia (Stacey) Leigh**  
**Mid-Pacific Region**  
**aleigh@usbr.gov**  
**916-978-5568**

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